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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CLINTONBAILEY, APC, Plaintiff and Respondent, v. JEFFREY W. BROKER et al., Defendants and Appellants.	G055868 (Super. Ct. No. 30-2017-00945185) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Glenn R. Salter, Judge. Affirmed.

Stephens Friedland, John B. Stephens and Timothy A. Spivey for Defendants and Appellants.

ONE and Peter Afrasiabi for Plaintiff and Respondent.

Jeffrey W. Broker (Broker) and Broker & Associates (BA)[1] appeal from the trial court's order denying its special motion to strike[2] ClintonBailey's (CB) complaint for fraud because it did not arise from protected activity. The parties disagree about the basis for CB's fraud claim. Broker contends it was his statements made during his deposition testimony. CB argues it was Broker's statements expressed during business negotiations *before* litigation commenced. We agree with CB and affirm the order.[3]

FACTS[4]

From 2012 to 2016, CB provided legal services to Lanes End, LLC. In 2013, Lanes End became delinquent in payments, and in 2015, CB requested payment or it would cease providing legal services. To ensure CB would continue to provide legal services, Lanes End offered CB collateral in the form of a promissory note secured by a deed of trust on real property in Chula Vista (the Agreement). CB's principal, Mark Bailey, believed Lanes End would require independent legal counsel for the Agreement or it could later assert it was unenforceable. Bailey discussed the issue with Broker, who had served as legal counsel for Lanes End's president and part owner, Jim Baldwin.

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[1] We refer to Broker and BA collectively as Broker, unless the context requires otherwise.

[2] A special motion to strike is also known as an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. (Code Civ. Proc., § 425.16, all further statutory references are to the Code of Civil Procedure.)

[3] In resolving this appeal, a discussion of the parties' allegations of conspiracy and extortion/bribery are unnecessary.

[4] The facts are derived from the complaint and the evidence submitted in connection with the special motion to strike. (*Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 815-816.)

Broker's role in the Agreement would later become the subject of the dispute. Bailey asserted Broker stated he was Lanes End's independent legal counsel. Broker, however, contended he represented Baldwin personally.

In the summer of 2015, Broker attended two meetings with Bailey, Baldwin, and others, including Chris Gonzales, Baldwin's Chief Financial Officer. At those meetings, they discussed the Agreement. Baldwin executed the Agreement in August 2015. CB represented Lanes End until sometime in 2016.

Lanes End filed a complaint against CB to invalidate the Agreement because CB did not comply with California Rules of Professional Conduct, rule 3-300 (Business Transactions with a Client and Pecuniary Interests Adverse to a Client) (Rule 3-300), and Probate Code section 16004 (Conflicts of Interest).[5] The trial court, Judge David Chafee, denied CB's motion for summary judgment. On February 28, 2017, Broker provided deposition testimony in response to a subpoena. During his deposition testimony, Broker asserted he was not Lanes End's counsel but Baldwin's personal counsel. CB and Lanes End ultimately settled the case.

CB sued Broker for fraud. CB alleged that after executing the Agreement, it continued to represent Lanes End, obtained a favorable result in litigation, and did not place a lien on Lanes End's trust account when it had sufficient funds to satisfy the unpaid legal bills. CB alleged that during the negotiations for the Agreement, Broker "repeatedly represented" to Bailey that he was legal counsel for Lanes End and he approved a promissory note stating Lanes End had independent legal counsel. CB said Bailey made it clear CB would not enter into the Agreement if Lanes End did not have independent legal counsel. CB added Broker's representations induced CB to enter into the Agreement, and CB relied on the representations to its detriment because it did not

[5] The California Rules of Professional Conduct were revised and renumbered effective November 1, 2018. Former rule 3-300 is now rule 1.8.1.

immediately withdrawal from representing Lanes End and pursue collection of Lanes End's unpaid legal bills. CB stated, "Broker has now admitted under oath that his earlier representations were false." CB asserted it was reasonable to rely on Broker's representations because he was a licensed attorney and Baldwin was not a party to the Agreement. CB claimed it was damaged because it incurred legal fees in defending itself against Lanes End's action to invalidate the Agreement, CB settled with Lanes End for less than it was owed, and Lanes End no longer had trust account funds to satisfy the unpaid legal bills. CB sought general and punitive damages.

Broker filed a special motion to strike supported by his declaration and exhibits. In his declaration, Broker admitted he was present at two meetings where the principals discussed the Agreement but based on Baldwin's comments, Gonzales was the person responsible for negotiating the agreement. Broker stated he was "solely" Baldwin's counsel and not Lanes End's counsel and testified truthfully to that at his deposition. He denied telling Bailey he represented Lanes End. CB filed an opposition to the special motion to strike supported by Bailey's declaration and exhibits. In his declaration, Bailey stated Broker said he was Lanes End's independent legal counsel. Broker filed a reply to the opposition supported by Broker's supplemental declaration.

The trial court posted its tentative ruling denying Brokers' special motion to strike. After hearing argument, the court adopted its tentative ruling as its final order because Broker failed to establish CB's fraud cause of action arose from its protected conduct. The court reasoned that although deposition testimony was protected activity (Code Civ. Proc., § 425.16, subd. (e)(1)), the complaint demonstrated CB's basis of liability was Broker's alleged misrepresentations during the Agreement negotiations. Citing to *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78 (*Cotati*), and *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-95 (*Navellier*), the court opined the fact Broker subsequently told the truth during his deposition testimony does not shield Broker or BA from liability for alleged misrepresentations he made prior to litigation.

DISCUSSION

I. Anti-SLAPP

"Anti-SLAPP motions are evaluated through a two-step process. Initially, the moving defendant bears the burden of establishing that the challenged allegations or claims 'aris[e] from' protected activity in which the defendant has engaged. [Citations.] If the defendant carries its burden, the plaintiff must then demonstrate its claims have at least 'minimal merit.' [Citations.]" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061 (*Park*); § 425.16.)

"Anti-SLAPP motions may only target claims 'arising from any act of [the defendant] in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . .' [Citation.] In turn, the Legislature has defined such protected acts in furtherance of speech and petition rights to include a specified range of statements, writings, and conduct in connection with official proceedings and matters of public interest. [Citation.]" (*Park, supra*, 2 Cal.5th at p. 1062, fn. omitted.) Our review is de novo. (*Id.* at p. 1067.) "'If the trial court's decision is correct on any theory . . . , we affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion.' [Citation.]" (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 876.)

The parties agree testimony, in a deposition or at trial, is protected activity. (§ 425.16, subd. (e)(1); *Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572, 1580.) But they disagree Broker's deposition testimony was the basis of liability. The parties and the trial court approached the issue based on the *Navellier* court's analysis of the "arising from" prong. On appeal, the parties again focus on *Navellier*. No one, including the trial court, discussed a case filed six months before Broker's special motion to strike. That case, *Park, supra*, 2 Cal.5th 1057, is instructive.[6]

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[6] After briefing was complete, we invited the parties to file supplemental letter briefs on the effect of *Park, supra*, 2 Cal.5th 1057, on this case.

In *Park*, defendant university denied plaintiff assistant professor tenure, and he sued alleging national origin discrimination and failure to prevent workplace discrimination. (*Park, supra,* 2 Cal.5th at p. 1061.) Defendant filed a special motion to strike plaintiff's complaint, arguing his suit arose from its decision to deny him tenure and from its communications made during the tenure process. (*Ibid*.) The trial court denied motion, and a divided court of appeal reversed. (*Ibid*.) The *Park* court addressed the issue of what nexus a defendant must show between the plaintiff's claim and the defendant's protected activity to succeed on a special motion to strike. (*Id*. at p. 1060.)

The *Park* court explained as follows: "A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.' [Citations.] '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' [Citations.] Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' [Citation.] 'The only means specified in section 425.16 by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e) . . . .' [Citation.] In short, in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." (*Park, supra,* 2 Cal.5th at pp. 1062-1063.)[7]

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[7] Section 425.16, subdivision (e), provides four categories of projected activity. As relevant here, section 425.16, subdivision (e)(1), provides as follows: "[A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law[.]"

To illustrate this point, the *Park* court compared two of its prior decisions, *Cotati, supra*, 29 Cal.4th 69, and *Navellier, supra*, 29 Cal.4th 82. (*Park, supra*, 2 Cal.5th at p. 1063.) In *Cotati*, mobile home park owners challenged the constitutionality of a city ordinance in federal court, seeking declaratory and injunctive relief. (*Cotati, supra,* 29 Cal.4th at p. 72.) City filed its own declaratory judgment action in state court asserting the ordinance's constitutionality, and owners filed a special motion to strike. (*Ibid*.) Our Supreme Court held that even though owners' federal lawsuit may have triggered city's action, the latter did not arise from the former because the basis of city's declaratory judgment claim existed independent of owners' lawsuit. (*Id*. at p. 80.) In *Navellier*, plaintiffs sued defendant for breach of contract and fraud because defendant entered into a release of claims in connection with the settlement of a prior action without intending to be bound by it and filing counterclaims in a prior unrelated pending federal court action. (*Navellier, supra*, 29 Cal.4th at pp. 86-87.) Our Supreme Court held plaintiff sued defendant because of the counterclaims and "but for the [prior] lawsuit and [defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Id*. at p. 90.)

The *Park* court explained the difference between these two cases as follows: "While in both cases it could be said that the claim challenged as a SLAPP was filed *because of* protected activity, in that perhaps the *City of Cotati* plaintiff would not have filed suit had the defendant not done so first, in only *Navellier* did the prior protected activity supply elements of the challenged claim. The *City of Cotati* plaintiff could demonstrate the existence of a bona fide controversy between the parties supporting a claim for declaratory relief without the prior suit, although certainly the prior suit might supply evidence of the parties' disagreement. In contrast, specific elements of the *Navellier* plaintiffs' claims depended upon the defendant's protected activity. The defendant's filing of counterclaims constituted the alleged breach of contract. [Citation.] Likewise, the defendant's misrepresentation of his intent not to file

counterclaims, a statement we explained was protected activity made in connection with a pending judicial matter [citation], supplied an essential element of the fraud claim [citation]." (*Park, supra,* 2 Cal.5th at p. 1064.)

Applying the distinction to the facts, the *Park* court held plaintiff's claim did not arise from protected activity. (*Park, supra,* 2 Cal.5th at pp. 1060-1061.) The elements of plaintiff's discrimination claim were "'(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.' [Citation.]" (*Id.* at pp. 1067-1068.) The *Park* court explained plaintiff could have omitted allegations about communicative acts or filing a grievance and stated the same claim because it "depend[ed] not on the grievance proceeding, any statements, or any specific evaluations of him in the tenure process, but only on the denial of tenure itself and whether the motive for that action was impermissible." (*Id.* at p. 1068.) Therefore, the court concluded: "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Id.* at p. 1060.)

"The essential elements of a count for intentional misrepresentation are (1) a misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance, (4) actual and justifiable reliance, and (5) resulting damage. [Citations.]" (*Chapman v. Skype Inc.* (2013) 220 Cal.App.4th 217, 230-231.)

Similar to *Park*, here, the elements of CB's fraud claim depend on Broker's alleged statements *before* litigation commenced. The basis of liability was for Broker's alleged fraudulent statements made during the negotiations leading to the Agreement.

(*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677 [business negotiations or transactions analogous to unprotected activity of public bidding].) CB had to prove the following: Broker told Bailey that he represented Lanes End; Broker knew he represented Baldwin personally; Broker intended that Bailey rely on that representation; Bailey reasonably relied on Broker's representation; and CB suffered damage. The elements of CB's fraud claim do not depend on Broker's statements during his deposition testimony that he represented Baldwin individually.

Although CB's fraud claim followed Broker's protected activity of providing deposition testimony and Broker's deposition testimony might supply evidence of liability, it was not the wrong complained of. As CB stated in its complaint, "Broker has now admitted under oath that his earlier representations were false." CB was not suing for Broker's statements during his deposition testimony that he represented Baldwin individually. Instead, CB was suing because Broker represented Baldwin individually despite Broker's previous misrepresentation he represented Lanes End.

Broker makes a number of claims concerning *Park*, *supra*, 2 Cal.5th 1057. Broker first asserts *Park* is distinguishable on the facts and public policy. *Park* is instructive because of its clarification of the "arising from" prong and not its facts or public policy. After contending protected activity is a necessary element to CB's fraud cause of action and providing fraud's elements, Broker next asserts CB could not rely on Broker's alleged misrepresentation because it was irrelevant to CB's duties to Lanes End pursuant to Rule 3-300. CB sued Broker for fraud, not a violation of Rule 3-300. And Broker does not explain how his deposition testimony, the speech it has consistently asserted was the basis of CB's fraud claim, is a necessary element of that cause of action. Contrary to its argument otherwise, CB could demonstrate the existence of a fraud claim, including damages, without Broker's deposition testimony, although his deposition testimony might supply evidence of liability. Finally, Broker asserts CB's complaint was insufficient to state a fraud cause of action and, for the first time, CB is judicially

estopped from asserting that action because it presented contradictory evidence in the Lanes End action. These claims are not relevant to prong one, and they are non-responsive to our order requesting supplemental briefing on *Park.*

Broker's reliance on *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658 (*Peregrine*), is misplaced. Broker cites to the following language: "Where . . . a cause of action alleges the plaintiff was damaged by specific acts of the defendant that constitute *protected activity* under the statute, it defeats the letter and spirit of section 425.16 to hold it inapplicable because the liability element of the plaintiff's claim may be proven without reference to the protected activity." (*Peregrine, supra,* 133 Cal.App.4th at p. 674, italics added.) Again, CB's fraud cause of action did not allege Broker's deposition testimony damaged it. Instead, it alleged Broker's statements during the Agreement negotiations damaged it. *Peregrine* is inapposite. Similarly unpersuasive is Broker's assertion CB's complaint was based on a series of alleged actions spreading over time and the protected conduct could not be separated from the unprotected conduct. (See *Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 594.) Again, CB's fraud cause of action was not based on a series of actions spread over time but instead an isolated misrepresentation during the Agreement negotiations. Contrary to Broker's claim otherwise, we are not holding deposition testimony may form the basis of liability or creating a new measure of damages. We simply hold CB's fraud claim did not arise from protected activity.

II. Motions for Judicial Notice

Both parties filed motions for judicial notice. CB requested we take judicial notice of the following exhibits from Orange County Superior Court case No. 30-2016-00853044: exhibit A-the trial court's notice of ruling on its motion for summary judgment/adjudication; exhibit B-CB's motion to compel discovery; and exhibit C-Lanes End's opposition to motion to compel discovery. Broker filed opposition to exhibits B and C. We grant CB's motion as to exhibit A (Evid. Code,

§§ 452, subd. (d), 459), and deny as to exhibits B and C because they are unnecessary for resolution of this appeal.

Broker requests we take judicial notice of Bailey's three declarations in Orange County Superior Court case No. 30-2016-00853044. Broker asserts these documents are relevant to the second prong of section 425.16. Because Broker did not carry its burden on the first prong, we do not reach the second prong. We deny Broker's request to take judicial notice of these documents.

DISPOSITION

We grant CB's motion to take judicial notice of exhibit A and deny its request to take judicial notice of exhibits B and C. We deny Broker's request to take judicial notice of Bailey's three declarations.

The order is affirmed. Respondent is awarded its costs on appeal.

O'LEARY, P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.